

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

IN RE: §
§
BORGER PROPERTIES, INC. § CASE NO. 10-20168-RLJ-11
§
Debtor. §

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

BORGER PROPERTIES, INC. §
§
Plaintiff, §
§
vs. § ADVERSARY NO. _____
§
AUER CORPORATION, and §
RAYMOND TEAGUE §
§
Defendants. §

NOTICE OF REMOVAL OF CIVIL ACTION

NOTICE

NO HEARING WILL BE CONDUCTED HEREON UNLESS A WRITTEN RESPONSE IS FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT P. O. BOX 15960, AMARILLO, TX 79105-0960 BEFORE THE CLOSE OF BUSINESS **TWENTY ONE (21) DAYS FROM THE SERVICE OF THIS MOTION**. IF SERVICE IS BY MAIL, THREE ADDITIONAL DAYS ARE ALLOWED PURSUANT TO FED.R. BANKR.P. 9006 (f).

ANY RESPONSE MUST BE IN WRITING, FILED WITH THE CLERK AND A COPY SERVED UPON COUNSEL FOR THE MOVING PARTY WITHIN THE TIME DESCRIBED ABOVE. IF NO RESPONSE IS TIMELY FILED, THE RELIEF REQUESTED SHALL BE DEEMED UNOPPOSED AND THE COURT MAY ENTER AN ORDER GRANTING THE RELIEF SOUGHT.

IF A RESPONSE IS FILED A FINAL HEARING ON THE MOTION WILL BE HELD AT 1:30 PM ON MAY 20, 2010 IN ROOM 100, 624 SOUTH POLK ST., AMARILLO, TEXAS 79101-2389.

TO THE HONORABLE COURT:

BORGER PROPERTIES, INC. (“Debtor” or “Plaintiff”), Plaintiff in the above-captioned Adversary Proceeding, and debtor-in-possession (“Debtor”) in the above-captioned Chapter 11 proceeding, respectfully files this Notice of Removal in order to effectuate removal of *Borger Properties, Inc. v. Auer Corporation and Raymond Teague*, Case No. 38,541, 84th District Court in and for Hutchinson County, Texas, and place same on the Court’s docket as an Adversary Proceeding.

I. GROUND

A. PROCEDURAL POSTURE AND BACKGROUND

1. This notice is filed under Federal Rule of Bankruptcy 9027, 28 U.S.C. §§ 157, 1452 and 1334, as applicable. Upon removal of the state court action, this civil action is a core proceeding under 28 U.S.C. §§ 157(b)(2)(B), (E), and/or (O).¹

2. Debtor is a Texas corporation, more specifically a single asset real estate entity, engaged in business in the hotel industry. In 2007 and 2008, Debtor, along with related entities Childress Hospitality, L.P., Perryton Hospitality, Inc., Borger Hospitality, Inc., Wheeler Hospitality, Inc. and Decatur Hospitality, Inc. (“Related Debtors”)², entered into contracts with Auer Corporation (“Auer”) whereby Auer agreed to act as the general contractor and construct 7 hotels for Debtor and Related Debtors. The hotel owned by Debtor (“Debtor’s Hotel Property”) is located in Hutchinson County, Texas, which falls within the geographic jurisdiction of this Court. The hotels owned by Related Debtors (“Related Debtors’ Hotel Properties”) are located in Ochiltree, Wheeler, Childress, Scurry, Martin and Wise Counties, Texas, all of which fall within the geographic jurisdiction of the Northern District of Texas, with the exception of Martin County, which falls within the geographic jurisdiction of the Western District of Texas.

¹ Debtor is cognizant of the fact that this Adversary Proceeding would also qualify for “related to” jurisdiction before this Court. However, in light of Debtor’s solid belief that this matter is a core proceeding, Debtor has elected not to brief the requirements of “related to” jurisdiction.

² A Motion for Joint Administration (“Motion”) is currently pending in Debtor’s and Related Debtors’ Chapter 11 cases, all pending in the United States Bankruptcy Court for the Northern District of Texas, Amarillo Division. Debtor anticipates that the Court will grant the Motion in the coming days.

3. During construction of the 7 hotels, litigation associated therewith sprang up all across the Northern District of Texas. The majority of the litigation involves unpaid subcontractors, many of whom provided labor and materials on Debtor's and all of Related Debtors' Hotel Properties, seeking to foreclose on mechanic's liens against Debtor's Hotel Property and Related Debtors' Hotel Properties. Additionally, eight lawsuits between Auer, Debtor and Related Debtors were filed ("Auer Litigation"), one of which is the state court lawsuit removed to become this Adversary Proceeding. The remaining paragraphs of this subsection are a more thorough recitation of the procedural history.

4. On or about February 18, 2009, Plaintiff filed suit against Auer Corporation and Raymond Teague ("Defendants"), under Case No. 38,541, in the 84th District Court in and for Hutchinson County, Texas.

5. On March 12, 2010, an order for relief under Chapter 11 of the United States Bankruptcy Code was entered in Chapter 11 Case No. 10-20168-RLJ-11, *In re Borger Properties, Inc.*, in the United States Bankruptcy Court for the Northern District of Texas, Amarillo Division.

B. BASIS FOR REMOVAL

6. "A party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title." 28 U.S.C. § 1452.

7. The bankruptcy court has original jurisdiction of this matter under 28 U.S.C. §§ 157(b) and 1334.

9. This Adversary Proceeding alleges causes of action for breach of contract, appointment of a receiver, conversion and fraud.

10. Upon removal of the state court action, this civil action is a core proceeding under 28 U.S.C. §§ 157(b)(2)(B), (E) and/or (O).

— **This Case is a Core Proceeding Pursuant to 28 U.S.C. § 157(b)(2)(B)**

8. This Adversary Proceeding will have an impact on the allowance or disallowance of a claim against the estate, and will directly affect the estimation of claims for the purposes of confirming a plan under Chapter 11. *See* 28 U.S.C. § 157(b)(2)(B). The relief sought by Debtor in this Adversary Proceeding, monetary damages and the return of Debtor's property, is necessary for formulation and confirmation of Debtor's Chapter 11 Plan. The ability of Debtor to satisfy many of the outstanding claims against the estate will be dependent upon the amount of Debtor's recovery against Auer, and Debtor's recovery will be decided in this Adversary Proceeding.

9. Further, due to the substantial amount of damages alleged by Debtor, the estimation of any such estate asset will affect, if not completely control, the Chapter 11 plan formulation for Debtor. Accordingly, this Adversary Proceeding is a core proceeding.

— **This Case is a Core Proceeding Pursuant to 28 U.S.C. § 157(b)(2)(E)**

11. This Adversary Proceeding includes causes of action seeking the appointment of a receiver for Auer, so that in turn said receiver may locate and turnover property of the several estate. *See* 28 U.S.C. § 157(b)(2)(E). Debtors have alleged that Auer has removed construction materials and other property from Debtor's Hotel Property and refused to return same to Debtor. In addition to monetary damages, Debtor seeks return of any of Debtor's property, now property of the estate. Accordingly, this Adversary Proceeding is a core proceeding.

— **This Case is a Core Proceeding Pursuant to 28 U.S.C. § 157(b)(2)(O)**

12. This Adversary Proceeding will have an impact on the liquidation of the assets of the estate and the adjustment of the debtor-creditor relationship. *See* 28 U.S.C. § 157(b)(2)(O). To illustrate, "The Fifth Circuit applies 28 U.S.C. § 157(b)(2)(O) when the controversy is 'inextricably tied to the bankruptcy proceeding because it affects the liquidation of assets.'" *In re Hallwood Energy, L.P., et al.*, 2009 WL2601294 at *7 (Bankr. S.D.Tex. 2009) (citing *In re Baudoin*, 981 F.2d 736, 742 (5th Cir. 1993)).

13. Any awards entered for or against Debtor will directly affect the amount of funds available to fund a Chapter 11 Plan, which Plan must address the claims of subcontractors who have filed Affidavits of Mechanic's Liens against Debtor's Hotel Property. However, more importantly, the outcome of this Adversary Proceeding may very well be dispositive as to whether Debtor will be able to reorganize under Chapter 11. Due to the large amount of damages at stake in this Adversary Proceeding, a judgment entered against Debtor, or even a finding of "no damages" awarded to Debtor, would likely force Debtor to abandon reorganization under Chapter 11, instead converting its case to one under Chapter 7 and moving forward with liquidation of the estate. Therefore, this Adversary is "inextricably tied" to the bankruptcy proceedings, and as such, this Adversary Proceeding is a core proceeding.

14. This notice is filed with the clerk of the Bankruptcy Court rather than the clerk of the United States District Court under the Order of Reference of Bankruptcy Cases and Proceedings filed among the records of the United States District Court for the Northern District of Texas.

15. Debtor consents to entry of final orders in this matter by the judge for the United States Bankruptcy Court for the Northern District of Texas, Amarillo Division.

16. Attached to this Notice of Removal as Exhibit "A" is a Certificate of Interested Parties.

17. Copies of all state court pleadings and processes are being filed contemporaneously with this Notice of Removal. Exhibit "B" attached to this Notice of Removal is an index of those pleadings being filed.

Respectfully submitted,

Bill Kinkead, SBN 11477400
KINKEAD LAW OFFICES
6937 Bell St., Suite G
Amarillo, Texas 79109
(806) 353-2129; (806) 353-4370 Fax

By: /s/ Bill Kinkead
Bill Kinkead

Attorney for Debtor Borger Properties, Inc..

CERTIFICATE OF SERVICE

This is to certify that on the 9th day of April, 2010, a true and correct copy of the above and foregoing document was sent by certified mail return receipt requested to the following:

Donna C. Kline, Esq.
16144 Bethel Road
Montgomery, TX 77356

/s/ Bill Kinkead

Bill Kinkead

EXHIBIT A
TO
NOTICE OF REMOVAL OF CIVIL ACTION
CERTIFICATE OF INTERESTED PERSONS

BORGER PROPERTIES, INC.

CASE NO. 10-20168-RLJ-11

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Amarillo, TX 79101-2364

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c/o Scott W. Sharp
Timberlake, Weaver and Sharp, PC
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Lubbock, TX 79401-4054

Borger Properties, Inc.
1424 Riverside Rd.
Roanoke, TX 76262-4409

Chetan Farikh
1420 Riverside Road
Roanoke, TX 76262-4409

Elliott Electric Supply
C/O Mathews, Stein, Shields
8131 LBJ Freeway, Ste 700
Dallas, TX 75251-1352

Govind Patel
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CLS Technology Inc.
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Contessa Inc.
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Elliott Electric, Inc. d/b/a Elliott Elect.
Robert L. Eden
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(p)INTERNAL REVENUE SERVICE
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Mullinn Board & Brown, LLP
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MELISSA TX 75454-2665

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EXHIBIT B
TO
NOTICE OF REMOVAL OF CIVIL ACTION

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- Attachment 2: Temporary Restraining Order and Order Setting Hearing for Preliminary Injunction
- Attachment 3: Service of Citation for Defendant, Auer Corporation
- Attachment 4: Service of Citation for Defendant, Raymond Teague
- Attachment 5: Certificate of Delivery by Certified Mail for Citation served on Raymond Teague
- Attachment 6: Certificate of Delivery by Certified Mail for Citation served on Auer Corporation
- Attachment 7: Defendant Auer Corporation's Motion to Transfer Venue and Motion to Dismiss or Stay and, Subject to those Motions, Defendant Auer Corporation's Original Answer, Response to Motion for Temporary Restraining Order and Motion for Sanctions
- Attachment 8: Order Granting Temporary Injunction
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- Attachment 11: Brief in Support of Motion to Transfer Venue
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- Attachment 16: Motion for Withdrawal of Counsel (2/25/2010)
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